

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL STEVEN MILLER,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 240386

Grand Traverse Circuit Court

LC No. 01-008566-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of operating a motor vehicle under the influence of liquor or with an unlawful bodily alcohol level, third offense, MCL 257.625(1)(b); MCL 257.625 (8)(c), and endangering an occupant younger than sixteen years of age, third offense, MCL 257.625(7)(a)(i); MCL 257.625(7)(a)(ii). The court sentenced defendant to five years' probation with the first twelve months in jail. The police arrested defendant and he was convicted because he drove his vehicle while he was intoxicated and, at the time, he had two minor children in the vehicle as passengers. We affirm.

Defendant contends that the trial court erred in allowing the prosecution to admit defendant's evidentiary breath test (EBT) results into evidence. The trial court ruled that the EBT results were admissible because the breathalyzer operator made a good-faith attempt to obtain a second sample. This Court reviews de novo the trial court's ultimate decision on a motion to suppress. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Defendant asserts that because a second breath sample was not obtained, the results violated 1999 AC, R 325.2655 and thus, the results should be inadmissible. The breathalyzer operator gave defendant an EBT and obtained a sample. An attempt to obtain a second sample was unsuccessful because defendant was unable to maintain a proper seal around the tube of the EBT. 1999 AC, R 325.2655 states that a second breath analysis must be requested from the person being tested, which was done here. Importantly, Rule 325.2655 also states that the first sample is sufficient to meet the requirements of the rule for evidentiary purposes. Accordingly, the first breath sample obtained from defendant was sufficient for evidentiary purposes at trial.

Defendant also says that the first sample alone was insufficient to meet the threshold relevancy requirement for evidence under MRE 401, 402, and 403. Specifically, MRE 403 states

that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Regarding the EBT results, defendant specifically points out several deviations from the Michigan Breath Test Operator Manual: the police officer did not (1) write “technical” on the evidence ticket; (2) advise defendant that a refusal was pending after each attempt to blow in the breathalyzer; and (3) put his certification number on the ticket.

If a good-faith effort is made to administer a second breathalyzer test, the result from the first sample is admissible. *People v Tomko*, 202 Mich App 673, 676-677; 509 NW2d 868 (1993). According to the plain language of 1999 AC, R 325.2655, the first breathalyzer result sample is sufficient for evidentiary purposes. The purpose of obtaining the second sample is merely to confirm the result of the first. *Id.*; *Tomko*, supra at 676-677. Moreover, there is no language in the rule or in case law that renders the first sample inadmissible as evidence because of the absence of a second sample.

Absent a showing that a technical violation resulted in inaccurate test results, a violation of the administrative rule may be harmless error. *People v Wujkowski*, 230 Mich App 181, 187-188; 583 NW2d 257 (1998). Here, there was no showing that the result from the first test administered to defendant was inaccurate. Moreover, the inability of a breathalyzer machine to obtain additional test results may not undermine the machine’s accuracy. *People v Fosnaugh*, 248 Mich App 444, 452; 639 NW2d 587 (2001). Defendant has failed to present any explanation or evidence suggesting that the machine provided inaccurate results from the first test. The fact that a confirming test result was not obtained was relevant solely to the weight of the evidence, *id.* at 453, and the prosecutor presented sufficient evidence – even without the breathalyzer test – of defendant’s intoxication. Indeed, defendant failed every field sobriety test administered to him prior to his arrest, and several officers testified that defendant exhibited all the signs of an intoxicated person. Because the first sample was sufficient to satisfy the statutory requirements for evidentiary purposes, the failure to obtain the second sample was not error requiring reversal, and there is sufficient evidence, independent of the EBT test, to affirm defendant’s conviction.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette